Supreme Court, U.S.
FILED
JUN 11 2003
OFFICE OF THE CLERK

No. 02-1610

In The Supreme Court of the United States

JILL JACOBY, Superintendent of Bethel School District, et al.,

Petitioners,

v.

TAUSHA PRINCE, a minor, by and through her parents, JAMES PRINCE and KIMBERLY PRINCE,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY BRIEF FOR PETITIONERS

WILLIAM A. COATS*
JOHN H. BINNS, JR.
DANIEL C. MONTOPOLI
VANDEBERG JOHNSON & GANDARA
1201 Pacific Avenue
Tacoma, WA 98402
(253) 383-3791
**Counsel of Record*

TYNA EK
MERRICK, HOFSTEDT & LINDSEY, P.S.
710 Ninth Avenue
Seattle, WA 98104
(206) 682-0610

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

REPLY BRIEF FOR PETITIONERS

Petitioners respectfully submit this brief in reply to Respondents' Brief in Opposition.

1. Respondents argue that the legal issues presented in this case are not novel, but rather have been resolved by Supreme Court precedent consistent with the Ninth Circuit's decision. This argument ignores the unique nature of the two forums to which the Bible Club in this case sought admission that distinguishes this case from every case upon which Respondents rely. The Bible Club sought the right to conduct religious meetings and prayer during the school day when attendance is mandated by state law, and it sought affiliation as an Associated Student Body of the public school. This not only takes this case outside the precedent relied upon by Respondents and the Ninth Circuit, but places this case in direct conflict with Supreme Court authority that has without exception stressed the importance of religious meetings only occurring before or after the school day to avoid violating the Establishment Clause. *See Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County*, 333 U.S. 203 (1948); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 116 n.6 (2001) (distinguishing *McCollum* because club's "activities take place after the time when the children are compelled by state law to be at the school."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (No Establishment Clause violation when event occurs after school); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements. . . .").

Respondents claim that it is immaterial that the Ninth Circuit decision requires the school district to allow the Bible Club to meet during instructional time within the school day because students who did not wish to participate in the religious activities of the club "would be *free* to go to the library (or other available locations) if they wish. . . ." Br. Opp. at 6 n.6 (emphasis added). On the contrary, students who did not wish to observe the religious meeting would be *forced* to leave the room and go to an approved activity, while those students who belonged to the religious club would be required to attend to receive academic credit for student/staff time. That is precisely the result that this Court rejected in *McCollum*.

Similarly, Respondents claim that this Court's equal access cases have already answered the questions presented here. Br. Opp. at 1 (citing *Mergens, Lamb's Chapel, Good News, and Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 830 (1995)). However, none of these cases involved the imprimatur of the school inherent in becoming an Associated Student Body organization which, under Washington State law, requires that the organization be "formed with the approval, and operated subject to the control, of the board of directors of a school board." Wash. Admin. Code §392-138-010(1).

2. Respondents attempt to distinguish *McCollum* by arguing that it does not preclude equal access rights in a public forum. Br. Opp. at 5 n.4. The Spanaway Lake High School ("SLHS"), however, has not created a public forum in its Associated Student Body program or in its student/staff time.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), this Court noted that public schools are nonpublic forums unless the school opens its facilities for

"indiscriminate use" by the public or by "some segment of the public, such as student organizations." *Hazelwood*, 484 U.S. at 267. In the three years preceding this lawsuit, seven noncurriculum-related clubs at SLHS were classified as Associated Student Body ("ASB") clubs: Heritage Club; Hiking Club; Key Club; Native American Club; Students Against Drunk Driving; Stock Market Club; and the Weightlifting Club. These clubs are of the type customarily found in public high schools and are not sufficiently numerous nor diverse to justify a conclusion that the SLHS has opened its ASB forum to "indiscriminate use."

Nor has SLHS opened its student/staff time to indiscriminate use by students. Meetings of ASB clubs during student/staff time are infrequent and the groups must receive prior approval before meeting. Because SLHS has maintained control over student/staff time, it should be allowed to determine which groups may meet during that classroom period.

3. Respondents contend the type of forum created by the Bethel School District is "immaterial" because the school district has engaged in viewpoint discrimination. Br. Opp. at 7. Respondents' argument fails because in a nonpublic forum a school may control the subject matter of the speech and because the school district has not engaged in viewpoint discrimination.

In a nonpublic forum, restrictions based upon speaker identity and subject matter are allowed if reasonable and viewpoint neutral. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985). The government's interest in avoiding controversy can provide a reasonable basis for excluding a subject or speaker from a nonpublic forum. *Id.* at 809-10; *see also Rosenberger*, 515

U.S. at 830 ("[C]ontent discrimination . . . may be permissible if it preserves the purposes of that limited forum. . . .").

The requirement of viewpoint neutrality does not mean that a public school must allow a religious organization access to its nonpublic forum if the subject matter is not part of the forum. As a public high school, SLHS should have the discretion to exclude certain subjects or groups from its nonpublic forums. For example, SLHS should have the discretion to exclude groups with a controversial agenda (e.g., pro-life or pro-choice); groups with a political agenda (e.g., Democrats, Republicans, Socialists), or groups with a religious agenda (e.g., Bible clubs). Any of these groups would be allowed to meet at the Bethel School District as student-sponsored and student-initiated group under District Policy 5525, but none must be formed as an ASB group because no student group with a similar subject matter agenda has been formed as an ASB club.

Similarly, SLHS should have the discretion to determine which groups may meet during student/staff time, when attendance is mandatory and students are required to engage in school-related and school-approved activities, without creating a public forum. Prior to this case, no court had ever held that a school creates a public forum merely by allowing a noncurriculum-related student group to meet during instructional time within the school day. Nor has any court held that a public school must allow a religious club to meet during instructional time within the school day if it allows a noncurriculum-related student group to meet during that time.

SLHS's decision to comply with the requirements of the Equal Access Act, to avoid an Establishment Clause

violation, and to prevent controversial groups from meeting during student/staff time is reasonable in light of the purposes of the student/staff time forum. Similarly, the decision to avoid a violation of the Establishment Clause by denying ASB status to controversial clubs is reasonable given the purposes of the ASB forum. Thus, the District's actions were reasonable and viewpoint neutral.

4. Respondents characterize the Bethel School District's policy of giving or lending supplies, audio-visual equipment, and transportation to student clubs as a matter of private action. Br. Opp. at 5-6. This case, however, does not involve private choice. No governmental funds or "vouchers" are given to individual students to spend as they wish on club activities. Rather, it is the School District that decides whether a student club will receive public funds in the form of school supplies, audio-visual equipment, and transportation for field trips.

CONCLUSION

For the above reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

WILLIAM A. COATS*
JOHN H. BINNS, JR.
DANIEL C. MONTOPOLI
VANDEBERG JOHNSON & GANDARA
1201 Pacific Avenue
Tacoma, WA 98402
(253) 383-3791
**Counsel of Record*

TYNA EK
MERRICK, HOFSTEDT & LINDSEY, P.S.
710 Ninth Avenue
Seattle, WA 98104
(206) 682-0610

Attorneys for Petitioners

June 11, 2003